



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYERI

CRIMINAL APPEAL NO. 160 OF 2008

PAUL GITAHU NGUTHIRU APPELLANT

VERSUS

REPUBLIC RESPONDENT

(Appeal from original Conviction and Sentence of the Chief Magistrate's Court at Nyeri in Criminal Case No. 2800 of 2005 dated 14th February 2006 by R. Nyakundi – C.M.)

J U D G M E N T

The appellant, **Paul Gitahi Nguthiru** was tried and convicted by **R. Nyakundi**, Chief Magistrate, Nyeri Law Courts for the offence of robbery with violence contrary to *Section 296 (2)* of the Penal Code and was sentenced to death. Two of his co-accused, **David Muchunu Irungu** and **James Wachira Kairu** were however acquitted of the charges. The appellant was aggrieved by the conviction and sentence. Hence he preferred the instant appeal.

The appellant in his petition of appeal and written submissions has impugned the learned Magistrate's judgment on several grounds, principle of which is; "... **That the honourable trial magistrate erred in law and in facts in failing to honour the provisions of section 77(2)(b) and (c) of the constitution when conducting the trial.**" In other words the appellant is saying that his trial was fatally defective as the language of the court and in which he was tried was not indicated in the court record. That omission in his view violated a constitutional right granted to him by virtue of section 77(2) of the Kenyan Constitution.

Prosecution evidence as laid down by PW1 is that he was asleep in his house on the night of 12th and 13th June 2005 at about 11 p.m. when he heard a bang on the door. He woke up and immediately heard another loud bang on the children's door. He immediately raised alarm having put on security lights. In a little while the bangs stopped. In the company of PW2, his wife, they went out of the house and confirmed that some items had been stolen from the house. The police were alerted and they came to the scene led by PW6. The report made to the police as aforesaid formed the basis of subsequent investigations. In the course of investigations some of the items stolen as aforesaid were recovered. The said items were positively identified by the complainants. Indeed the recovery was made on 13th June 2005 in the house of the Appellant so soon after the robbery. The recovery was as a result of information gathered from one, **Charles Wachira**, who was in police custody at the time. He led PW5 and 6 to the house of the appellant from whose house a recovery of a video deck, Erickson mobile and Walkman

Naiwa was made. Following the recovery, the appellant and his co-accused were charged.

In his sworn defence the appellant said that on 12th June 2005 he was at his place of work. He left for his house where he stayed until 13th June 2005 at about 6.40 p.m. when some people went to his house and introduced themselves as police officers. They arrested him and escorted him to Karatina police station where he was locked up and tortured. The police officers demanded Kshs.5000/= for his release which he did not have. He denied the offence of robbery or having anything to do with the items allegedly recovered from his house.

Having carefully considered the evidence on record and weighed it, the learned magistrate came to the conclusion that the appellant was guilty as charged. Accordingly he convicted and sentenced him as already stated.

When the appeal came before us for hearing, the appellant maintained through his written submissions that the proceedings in the trial court were defective as the trial Magistrate did not record the language of the court throughout the trial. **Ms Ngalyuka**, learned state counsel conceded the appeal on that ground and rightly so in our view.

In the case of **Degow Dagane Nunow v/s Republic Criminal Appeal No.233 of 2005** (unreported) the court of appeal said in part:-

“Of course there was right from the beginning of the trial an interpreter present in court, that is clearly shown in the record of the Magistrate. What is not shown throughout the record is the language which the appellant or the witnesses addressed the Magistrate.....”

On this aspect of the matter, the burden is on the trial court to show that an accused person has himself selected the language which he wishes to speak and in which proceedings are interpreted to him. As we have repeatedly pointed out, those are not mere procedural technicalities. There is, first Section 198 of the Criminal Procedure Code and that section Provides:-

“198(1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open court in a language which he understands.

(2) If he appears by advocate and the evidence is given in a language other than English and not understood by the advocate it shall be interpreted to the advocate in English.”

The court went on further to say in the judgment that:-

“The provisions show that the question of interpretation of evidence to a language which an accused person understands is not a matter for the discretion of the trial Magistrate – it must be done and the only way to show that it has been done is to show from the beginning of the trial the language which an accused person has chosen to speak. Section 77 of the Constitution is in relevant parts, in these terms:-

“77 (2) Every person who is charged with a criminal offence.....

(a).....

(b) Shall be informed as soon as reasonably practicable, in a language that he understands and in detail of the nature of the offence with which he is charged;

(c).....

(d).....

(e).....

(f) Shall be permitted to have without payment the assistance of an interpreter if he cannot understand the language used in the trial of the charge.”

The court then finally concluded:-

“It is the responsibility of the trial courts to ensure compliance with those provisions. Trial courts are not only obliged to ensure compliance with the provisions; they are also obliged to show in their records that the provisions have been complied with. There is no reason why a trial court should leave an appellate court to presume the provisions must have been complied with while it can easily be demonstrated by the record that compliance did in fact take place.”

From the foregoing it comes out quite clearly that in criminal trials the language of the trial court must be understood by the accused person and it is normally standard practice for the trial courts to record the nature of the interpretation used or the name of the interpreter.

The trial Magistrate in this case made no such note of the language in which the appellant had chosen to conduct the trial and in which the proceedings were to be conducted and that the evidence of the witness was being tendered and interpreted to him. In the case of **Kiyato v/s Republic (1982 – 88) KAR 418**, the Court of Appeal held:

“.....It is fundamental right, under the Constitution of Kenya section 77 (2) that an accused person is entitled without payment, to the services of an interpreter who can translate the evidence to him and through which he can put questions to the witnesses, make his statutory statement, or give his evidence. Moreover, the Criminal Procedure Code (Cap 75) section 198 (1) also requires that evidence should be interpreted to an accused person in a language that he understands.....”

2. It is the standard practice in the courts to record the nature of the interpretation used and the name of the interpreter. The trial magistrate in this case made no note of the language in which the evidence of the witnesses was being interpreted....

4. There had been no compliance with the Constitution of Kenya section 77 (2) and the Criminal Procedure Code (Cap 75) section 198 (1) in this case.....”

Accordingly the appeal was allowed. Again the case of **Abdalla v/s Republic (1989) KLR 456**, the Court of Appeal reiterated the position as follows:-

“.....This court has recently held that it is a fundamental right of an accused charged with a criminal offence to have the assistance of an interpreter through whom the proceedings shall be interpreted to him in a language which he understands. See Biba Wako Kiyato Republic, Criminal Appeal No.100 of 1985, Section 77(2) (4) of the constitution and Section 198 (1) of the Criminal Procedure code. The record of the trial court alludes to interpretations into Kiswahili but does not state that there was any clerk or interpreter in court; only the presence of the Magistrate, the prosecutor and the accused are recorded. This record lends credence to the appellant’s complaint that there was no interpretation of the proceedings to him in a language that he understands though the record has indications that he may have followed the gist of the proceedings. In the circumstances, there was a breach of the appellant’s constitutional and fundamental right which is fatal to the proceedings.....”

Yet again the court of appeal in the not so distant past in the case of **Swahibu Simbauni Simiyu & another v/s Republic, Criminal Appeal No. 243 of 2005 (Kisumu)** (unreported), remarked:-

“...The trial then commenced with the first witness giving his evidence in Swahili. There is nothing in the record of the magistrate to indicate that the appellants understand Swahili. Two witnesses gave evidence that day and as both Mr. Karanja and Mr. Musau rightly pointed out to us, the appellant asked very few questions. The trial proceeded on 5th February, 1997 when virtually all the witnesses testified with some giving evidence in Swahili and others in English. Once again each

appellant asked very few questions and when they were finally put on their defence, each appellant is shown to have addressed the court, it being recorded:

Accused 1 sworn states

Accused 2 unsworn states

Once again it is not shown what language each appellant used so that from the record of the magistrate it is really not possible to say each spoke English or in Swahili and whether each of them understood whatever language was being used. We find it incredible that this could have happened in the court of a Senior Principal Magistrate. Clearly there was not the slightest attempt to comply with the provisions of the Kenya Constitution or the Criminal Procedure Code. On that basis alone, the appeals must be allowed.....”

What happened to the trial leading to these appeals? We have scrutinized the record of the trial Magistrate and found that when the trial commenced on 7th October 2005, and PW1 and PW2 testified it is merely recorded “... **PW1 Sworn Swahili States....**” However when it came to PW3, 4, 5 and 6 the record is silent as in which language these 4 witnesses testified. It is simply indicated “**PW... sworn states as follows....**” Finally when it came to PW7, it is indicated that he testified in English. The assumption here is that the appellant perhaps understood the language the witnesses testified in assuming it was English, but there is nothing on record to show that indeed that was the case or that English was the preferred medium of communication in the proceedings by the appellant. It is indicated in the record that the appellant cross-examined the witnesses, but the language used is not also indicated. The appellant then gave sworn statement of defence. But here again, it is not shown what language he opted to use. The appellant has throughout this appeal maintained that he was not conversant with English language. We have no reason to disbelieve him. There is no reason or basis for us to presume anything, more so that the appellant spoke and understood the English language in which he was recorded to have answered the charge and conducted the trial. As we have had occasion to state in the past the record of the trial Magistrate must speak for itself. We are after all a court of record. This ground alone is sufficient to dispose of this appeal.

We must now consider whether to order a retrial. **Ms Ngalyuka** is of the view that this is an appropriate order to make in the circumstances as the evidence against the appellant was overwhelming. The appellant would hear none of the above claiming that since he had been in custody since 13th June 2005 a retrial ought not to be ordered. The principles applicable in determining whether a retrial should be ordered are now settled. A retrial should only be ordered:-

- (i) If the original trial was illegal or defective.**
- (ii) If it is in the interest of justice.**
- (iii) If it will not occasion injustice or prejudice to the appellant.**
- (iv) If it will not accord the prosecution opportunity to fill up gaps in its evidence at he first trial.**
- (v) If upon consideration of the admissible or potentially admissible evidence a conviction may result, and finally**
- (vi) Each case must depend on its particular facts and circumstances.**

A late addition to the foregoing is consideration of the length of time that the appellant has been behind bars as well the likelihood of the prosecution tracing the witnesses in good time so as to mount a successful prosecution. See generally:-

(a) Ahamedali Ali Dharamshi Sumar v/s Republic

(1964) E.A. 481.

(b) Fatehali Manji v/s Republic (1966) E.A. 343.

(c) M'Kanake v/s Republic (1973) E.A. 67.

(d) Mwangi v/s Republic (1983) KLR 522.

The above conditions that must be satisfied are conjunctive and not disjunctive and one of them which must be present is that the trial in the subordinate court must have been defective or a nullity. We have already so held in the circumstances of this case.

No doubt, the offence committed was serious. The public will take umbrage, and justly so in our view, if people who had been convicted for such heinous offence were to be released back in to society merely because of a procedural irregularity on the part of the learned magistrate. A retrial will thus be in the interest of justice. We have no doubt in the circumstances of this case that the evidence marshalled against the appellant was overwhelming. We are certain that if the self-same evidence was tendered at the retrial a conviction is likely to result. Such evidence will not require any filling up. The appellant has been behind bars since 13th June 2005, a period of about 3 years. This is not such a long period of time as to occasion injustice or prejudice to the appellant in the event of a retrial. The justice of this case accordingly cries out for a retrial and we so order.

Accordingly the appellant shall appear before the Chief Magistrate's court, Nyeri on 5th November 2008 for his retrial to commence before any other magistrate of competent jurisdiction other than **R. Nyakundi**, CM who presided over the initial trial. Till then the appellant shall remain in prison custody.

Dated and delivered at Nyeri this 29th day of October, 2008.

MARY KASANGO

JUDGE

M.S.A MAKHANDIA

JUDGE